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KETUA PENGARAH HASIL DALAM NEGERI v. TENAGA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
SEE MEE CHUN JCA
B HASHIM HAMZAH JCA
[CIVIL APPEAL NO: W-01(A)-84-02-2022]
16 MAY 2024

C **Abstract** – *In a taxing Act, one must look merely at what is clearly said. There is no room for any intendment; no presumption as to tax, nothing is to be read in and nothing is to be implied. The activity of generating electricity is not expressly excluded as manufacturing under the Income Tax (Prescription of Activity Excluded from the Definition of* D *Manufacturing) Rules 2012. If it was intended to be excluded, it would have been expressly provided so. The generation of electricity is to be treated just like any other manufacturing plant or factory that manufactures goods or other articles and falls squarely within the meaning of 'manufacturing'. The claimant is eligible to re-investment allowance under Schedule 7A of the Income Tax Act 1967.*

E

REVENUE LAW: *Income tax – Re-investment allowance – Eligibility – Whether claimant involved in business of manufacturing electricity – Whether service provider – Whether generation, transmission and distribution of electricity amounted to manufacturing of electricity – Whether generating of electricity from* F *activity of manufacturing expressly excluded under Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012 – Whether claimant entitled to claim re-investment allowance – Income Tax Act 1967, Schedule 7A*

G ***WORDS & PHRASES:*** *'manufacturing' – Meaning of – Whether generation, transmission and distribution of electricity amounted to manufacturing of electricity – Whether dictionary meaning applicable*

The respondent, Tenaga Nasional Bhd, had claimed reinvestment allowance ('RA') for the year of assessment (YA) 2018 in its tax return. After an H exchange of correspondence, the appellant informed the respondent that the RA claimed for YA 2018 was disallowed and issued a notice of additional assessment amounting to RM1,812,506,384.64. This prompted the respondent to file an application for judicial review, *inter alia*, for an order of *certiorari* to quash the appellant's decision and a declaration that the I respondent be entitled to claim under Schedule 7A of the Income Tax Act 1967 ('ITA'). The High Court Judge, in allowing the judicial review application, found, *inter alia*, that the respondent was in the business of manufacturing electricity and did not fall within the circumstances under

which it could not claim for the RA. Further, the activity of generating electricity was not listed as an activity excluded as manufacturing under the Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012. Hence, this appeal, on the sole issue of whether the respondent was eligible to claim for the RA where it claimed to be in the business of manufacturing electricity.

Held (dismissing appeal)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The RA is a special incentive allowance given in accordance with s. 133A of the ITA. A reading of para. 1, Schedule 7A of the ITA would show that in order to be eligible for the RA, the respondent has to incur capital expenditure ('capex') on a factory, plant or machinery for the purposes of a qualifying project. It could not be said that merely because the word 'manufacturing' is not used to describe the activity in the respondent's Directors' Report and Financial Statements, that the respondent was immediately said to be not involved in the manufacturing of electricity. The respondent must have produced and manufactured the electricity from a source in order for it to supply electricity to its consumers. (paras 35, 37, 39 & 40)

(2) The Federal Court in the case of *Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd* ('*MPSP*') recognised how electricity was to be treated and found that it was produced just like in any other manufacturing plant or factory that manufactures goods or articles. Further, the court in MPSP referred to other jurisdiction and found support to its finding that electricity was goods which bore the same meaning as articles and the applicant there was involved in manufacturing. The generation, transmission and distribution of electricity amounted to the manufacturing of electricity. The respondent was thus involved in the business of manufacturing electricity and therefore, fulfilled the requirements of para. 1, Schedule 7A read together with para. 8 in relation to a qualifying project, so as to entitle it to its claim for the RA. (paras 46, 50, 56 & 57)

(3) Pursuant to the Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012, there are 20 activities which have been excluded as not being manufacturing. The manufacture of electricity was absent in the exclusion. If it had been intended to exclude the generating of electricity from the activity of manufacturing, it should have been so stated in the 2012 Rules. (paras 59 & 60)

(4) The definition of 'manufacturing' was inserted into para. 9 *vide* s. 46(f) of the Finance Act 2009 with effect from YA 2009. The respondent had already, prior to that, first applied for the RA in YA 2003. The

definition of 'manufacturing' does not apply to the respondent where its RA claim was made in YA 2003. However, the respondent's existing right could not be affected by the new definition. (paras 62 & 63)

(5) As the definition of 'manufacturing' does not apply, the court was not restrained from attributing a dictionary meaning to it; 'make something on a large-scale using machinery', 'make or produce (something abstract) in a merely mechanical way', and 'the making or producing of anything; generation'. Within these confines and meaning, the generating of electricity would amount to manufacturing. Further, 'manufacturing' would equally apply to 'factory' and in construing the meaning of 'factory', the functionality of the claimed items has to be considered. The claimed items were not adjunct to the process of manufacturing and related to the manufacturing of electrical energy. This would entail the functionality of the items. Paragraph 1(b), Schedule 7A states the claim for the RA on capex is on a factory, plant or machinery, whereby these words are to be read disjunctively. (paras 65, 66 & 69-72)

(6) Since the respondent was involved in the business of manufacturing electricity, it follows that it was not a service provider where Schedule 7B would have applied. (para 73)

Case(s) referred to:

AGL Victoria Pty Ltd v. Lockwood [2003] VSC 453 ***(refd)***

Board Of Councillors, Bhatpara Municipality v. CESC Ltd & Ors (2007) 3 CHN 328 ***(refd)***

Canadian Wirevision Ltd v. The Queen (1979) 2 FC 164 ***(refd)***

Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd [1980] CLJU 141; [1980] 1 LNS 141 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd (2015) MTSC 30-091 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformer Manufacturer Sdn Bhd [2012] MSTC 30-039 ***(refd)***

Kidurong Power Generation Sdn Bhd v. Menteri Kewangan Malaysia [2022] CLJU 2778; [2022] 1 LNS 2778 HC ***(refd)***

Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd [2004] 4 CLJ 389 FC ***(foll)***

National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***

Nuclear Electric Plc v. Bradley (HM Inspector Of Taxes) 1 68 TC 670 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Quebec Hydro-Electric Commission v. The Deputy Minister Of National Revenue For Customs And Excise [1970] RCS 30 ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

Legislation referred to:
Finance Act 2009, ss. 23(c), 46(f)
Income Tax Act 1967, s. 133A, Schedule 7A, paras 1(b), 2B, 7, 8(a), 9, Schedule 7B
Interpretation Acts 1948 and 1967, s. 17A
Local Government Act 1967, s. 2

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[Editor's note: For the High Court judgment, please see Tenaga Nasional Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 7 CLJ 285 (affirmed).]

Reported by S Barathi

JUDGMENT

See Mee Chun JCA:

Introduction

[1] In a nutshell, this appeal turns on the singular issue of whether the respondent is eligible to claim an incentive, the Reinvestment Allowance (RA), pursuant to Schedule 7A of the Income Tax Act 1967 (ITA). The amount of RA being claimed comes up to RM1,812,506,384.64.

Parties And Background Facts

[2] The appellant is the Director General of Inland Revenue. The respondent is Tenaga Nasional Berhad.

[3] The respondent had claimed RA for the year of assessment (YA) 2018 in its tax return, encl. 6/231-242. After an exchange of correspondence where the respondent was required to submit various documents, the appellant on 3 July 2020 informed the respondent that the RA claimed for YA 2018 was disallowed. Subsequently, the appellant issued notice of additional assessment dated 13 July 2020 amounting to RM1,812,506,384.64.

[4] This then prompted the respondent to file its application for judicial review (JR) dated 21 July 2020 for *inter alia* the following (encl. 3/24-26):

> (1) THAT the Applicant be granted leave of this Honourable Court to file an application for:
>
> (a) an order of *Certiorari* to quash the Respondent's decision in the form of a notice of additional assessment for the year of assessment 2018 dated 13.7.2020 ("Decision") on the grounds that the said Decision of the Respondent in this respect was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the Applicant's legitimate expectations;

(b) a Declaration that the Applicant is entitled to claim reinvestment allowance under Schedule 7A of the ITA in respect of the capital expenditure incurred on the items listed in the Applicant's reinvestment allowance form for the year of assessment 2018; and

(c) a Declaration that the Respondent is bound by the decisions of the Superior Courts in *Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd* [2005] 1 MLJ 1 which ruled that the Applicant is a manufacturer of electricity and *Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformer Manufacturer Sdn Bhd* [2012] MSTC 30-039 which ruled that the Respondent's internal policy on the interpretation of Schedule 7A of the ITA is without any legal basis and has no force of law.

[5] Leave was granted on 30 September 2020 despite the objections of the appellant who appeared as the putative respondent. It then appealed against the leave granted. The appeal was withdrawn where there was a consent order among which it was agreed that the subject matter of the dispute be heard and resolved by way of JR.

[6] The High Court Judge (HCJ) allowed the JR application. Hence, the appeal before us.

Decision Of The HC

[7] The grounds of judgment of the HCJ dated 6 March 2022 are in encl. 3/96-140.

[8] In para. 13 of the GOJ, the HCJ identified the main issue to be whether the respondent's principal activity of generating electricity is in the business of manufacturing electricity and falls under "qualifying project" for it to be entitled for RA under Schedule 7A of the ITA.

[9] The HCJ found that the Federal Court had in *Majlis Perbandaran Seberang Perai v. Tenaga Nasional Bhd* [2004] 4 CLJ 389; [2005] 1 MLJ 1 dealt with the meaning of electricity and that electricity is goods where the power station can be considered as a factory for the production of an article which is for sale and therefore, the respondent is involved in commercial/business activity peculiar in its own way. Refer to paras. 25 and 26 of the GOJ.

[10] Reference was also made to various cases from the United Kingdom, Canada and India which have held that generating, transforming and distributing electricity is a part of the manufacturing process of electricity. These may be found in paras. 27 to 41 of the GOJ. In para. 42, the HCJ found that such cases involve similar issues where the production of electricity cannot be different from the instant case.

[11] The respondent was thus found to be in the business of manufacturing electricity.

[12] The HCJ then stated that the respondent did not fall within the circumstances under which it cannot claim for the RA (para. 43 GOJ). Further, the activity of generating electricity is not listed as an activity excluded as manufacturing under the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012 (para. 44 GOJ). It was next said as follows:

> [45] It is clear that nowhere in Paragraph 7 of Schedule 7A nor in the Rules 2012 that state generating of electricity is excluded from the activity of manufacturing ...
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> ...
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> [48] Secondly, Parliament cannot be said to restrict the activity of generating electricity as manufacturing and disqualify for the RA scheme, because if Parliament had intended to exclude such activity it could have stipulate it in the ITA. In *Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd* [2015] MSTC 30-091, the High Court had held:
>
> > If Parliament had intended reinvestment allowance to be restricted only to "production area", then Parliament would have surely specified this clearly in Schedule 7A. ...

[13] In para. 49 of the GOJ, the HCJ was reminded "that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax, nothing is to be read in, nothing is to be implied."

[14] The items being claimed for the RA such as transmission line, transformer, capacitor, switchgear, underground cables and distribution lines relate to the manufacturing of electrical energy. Reference was made to *Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformer Manufacturer Sdn Bhd* [2012] MSTC 30-039 where functionality of the claimed items in the overall context of the production in the manufacturing process in the factory ought to be taken as a valid factor to be considered in giving the appropriate meaning to the word "factory". Refer to para. 55 of the GOJ.

[15] In para. 61 of the GOJ, the HCJ said that the definition of manufacturing did not apply. It was said as follows:

> [61] ... at the time when the Applicant first claimed the RA in the YA 2003, the definition of "manufacturing" has not been defined in the ITA. The definition of "manufacturing" was first introduced in the ITA in 2009 *via* section 46(f) of the Finance Act 2009 for the purposes of RA with effect from the YA 2009 and subsequent years of assessment. It is of the considered view that the definition does not apply to the Applicant as the RA claim was first made in YA 2003. The Applicant's existing right cannot be impaired or affected by the insertion of a new definition and the definition of manufacturing pursuant to Paragraph 9 of Schedule 7A ITA is inapplicable to the Applicant ...

[16] The HCJ was of the considered view that the respondent has the option to choose which special incentive relief it wants to opt, and not for the appellant to dictate the incentive to be applied for (para. 63 of the GOJ).

[17] The HCJ concluded as follows:

> [64] In adopting a holistic approach as to the Applicant's business as whole and not in isolation and as to what electrical energy is, whether it is just a commodity or part of manufacture and production, this court is persuaded by the decisions of the Commonwealth countries cited in the above as this Court shares the view that in generating electricity into a form that can be used by the customer, the generation and transformation must be considered to be part of the manufacture and production of electricity.
>
> [65] Then, in scrutinizing the functions of the disputed items claimed for RA under Schedule 7 A as well as the particulars of project stated by the Applicant in the RA Form, it is of the considered view that the disputed items relate to manufacturing of electrical energy.

Submissions Of The Appellant

[18] It was submitted by the appellant that the HCJ had committed three errors of law, namely misconstrued Schedule 7A of the ITA, misapplied the *ratio decidendi* of *Majlis Perbandaran Seberang Perai* and exceeded its parameters in JR jurisdiction.

[19] The broad contentions are that Schedule 7A of the ITA applies to a manufacturing company carrying out a qualifying project and does not apply to the respondent. Generating electricity, transmission and distribution is not a manufacturing activity under Schedule 7A. The respondent is a service provider eligible for the incentive under Schedule 7B.

[20] The first point of contention was that the respondent's core activity does not fall under Schedule 7A of the ITA. The RA applies only to manufacturing companies carrying out manufacturing activities that transform raw materials into an end-product in a factory, and the capital expenditure incurred on the factory, plant or machinery for a qualifying project is eligible for the RA.

[21] It was contended that the respondent is required to carry out the manufacturing activity in a factory, as per the definition of manufacturing read with the definition of factory. The electricity is distributed to consumers through a network system comprising transmission and distribution lines. As the business activities are not carried out in a factory, the items being claimed are not machinery installed in a factory where there is no factory in the first place.

[22] On manufacturing, the critical issue is whether the respondent's core activities in the generation, transmission, distribution and sale of electricity to consumers meet the condition prescribed under Schedule 7A of the ITA.

The HCJ erred in finding that the definition of manufacturing is inapplicable to the current appeal. The respondent cannot avail itself to the 15 consecutive years starting from YA 2003, as each time it incurs capital expenditure, it has to comply with para. 1 of Schedule 7A the appellant had not allowed the respondent's claim for RA since its first claim in YA 2003. The respondent is a not manufacturing company but a service provider.

[23] It was further submitted that, the incentives provided under Schedule 7A or 7B are not an option. The aforesaid provisions do not provide that it is an option and the HCJ cannot read words into the statute where it is not entitled to do so.

[24] *Majlis Perbandaran Seberang Perai* is not applicable where the facts and issues are different. The instant appeal deals with Schedule 7A of the ITA while *Majlis Perbandaran Seberang Perai* deals with s. 2 of the Local Government Act 1967 (LGA). Similarly, the Commonwealth cases relied on by the HCJ dealt with different facts and issues.

[25] The appellant had exercised its discretion legally as its decision was correct. An erroneous interpretation is not a lack of jurisdiction on the appellant's part.

[26] Reference was made to *Kidurong Power Generation Sdn Bhd v. Menteri Kewangan Malaysia* [2022] CLJU 2778; [2022] 1 LNS 2778. The appellant there owned, operated and managed the 826 MV combined turbine power plant located at Tanjung Kidurong, Bintulu. There, it applied to be approved as an approved service project and for tax incentives under Schedule 7B. Here, the respondent too should apply under Schedule 7B.

Submissions Of The Respondent

[27] The respondent submitted that it is in the business of manufacturing electricity and this has been well-settled in *Majlis Perbandaran Seberang Perai* where it was said that "the power station ... can be considered as a factory for the production of an article, that is electricity just like any other manufacturing plants or factories that manufacture goods or articles." In this regard, the Federal Court had looked into cases involving tax matters and agreed that electricity is an article or goods in the context of LGA and that the respondent is involved in the business of manufacturing electricity.

[28] There are many other Commonwealth cases that support the contention that the respondent is involved in the business of manufacturing electricity.

[29] The manufacturing of electricity is not excluded under para. 7 of Schedule 7A which has laid out specific circumstances where a taxpayer cannot claim the RA. Further, the aforesaid is not excluded under the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012.

[30] When the respondent first claimed the RA in YA 2013, there was no definition of manufacturing. In the absence of a definition, the ordinary meaning is to apply.

[31] As the definition of manufacturing only came into effect from YA 2019, this new definition cannot affect or impair the respondent's existing rights.

[32] It was further submitted that the law on the RA and the definition of manufacturing must be read purposively and Schedule 7A should not be viewed narrowly. This is by virtue of s. 17A of the Interpretation Acts 1948 and 1967.

[33] On the requirement of the manufacturing activity to be conducted in a factory, the definition of factory was introduced in YA 2012 where such definition does not apply to the respondent. Further, the claim for the RA on capital expenditure is on a factory, plant or machinery, whereby these words are to be read disjunctively.

Our Decision

Issue

[34] As noted at the outset, the sole issue relates to whether the respondent is eligible to claim for the RA where it claims to be in the business of manufacturing electricity.

The Law On The RA

[35] To begin with, the RA is a special incentive allowance given in accordance with s. 133A of the ITA. The aforesaid section provides as follows:

> **Special Incentive Relief**
>
> Special incentive relief
>
> 133A. Notwithstanding any other provisions of this Act, special incentive relief shall be given in accordance with Schedule 7A and Schedule 7B.

[36] Schedule 7A is therefore the all important provision on the RA and we reproduce *in extenso* the relevant paragraphs as follows:

> SCHEDULE 7A
>
> [Section 133A]
>
> **Reinvestment Allowance**
>
> 1. Subject to this Schedule, where a company which is resident in Malaysia -
>
> (a) has been in operation for not less than thirty-six months; and

(b) *has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project referred to under subparagraph 8(a);*

(c) (Deleted by Act 591),

there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty per cent of that expenditure:

Provided that such expenditure shall not include capital expenditure incurred on plant or machinery which is provided wholly or partly for the use of a director, or an individual who is a member of the management, or administrative or clerical staff.

8. In this Schedule, "qualifying project" means -

(a) *a project undertaken by a company, in expanding, modernizing or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry;*

(b) (Deleted by Act 693);

(c) an agricultural project undertaken by a company in expanding, modernizing or diversifying its cultivation and farming business excluding the business of rearing chicken and ducks; or

(d) (Deleted by Act 755). (emphasis added)

Capital Expenditure

[37] A reading of para. 1, Schedule 7A would show that in order to be eligible for the RA, the respondent has to incur capital expenditure (capex) on a factory, plant or machinery for the purposes of a qualifying project. Insofar as capex is concerned, it is common ground that the respondent had claimed the RA on capex for machinery; namely PMU switchgear, transmission lines, transformer, capacitor, underground cables/lines and distribution lines and substations.

Qualifying Project

[38] A qualifying project has been defined in para. 8(a), Schedule 7A to mean a project to expand, modernise or automate the respondent's existing business in respect of manufacturing or processing of a product (emphasis added). Therein lies the heart of the dispute, which is whether the respondent is involved in the business of manufacturing electricity.

Business Of Manufacturing Electricity

[39] In the respondent's directors' report and financial statements for the year ended 31 December 2018, the respondent's principal activities are stated to be:

Principal Activities

The Group and Company are primarily involved in the business of the generation, transmission, distribution and sales of electricity ...

[40] It cannot be said that merely because the word "manufacturing" is not used to describe the activity, that the respondent is immediately said to be not involved in the manufacturing of electricity. This is because the respondent must have produced and manufactured the electricity from a source in order for it to supply electricity to its consumers. The electricity must have come from somewhere. This means that from where the electricity comes from, be it coal or water, it has to undergo a process before it ends up in the form of a product called electricity. If indeed the respondent does not manufacture electricity, then it begets the question of where the respondent procured the electricity from.

[41] We find support for the above and that the respondent is indeed involved in the business of manufacturing from *Majlis Perbandaran Seberang Perai* (*MPSP*). In *MPSP* a question of law which required the determination of the Federal Court was whether electricity is an article for the purpose of determining the annual value of a power station in accordance with the definition of annual value in s. 2 of the LGA.

[42] At p. 9 when agreeing that the use of machinery in the operation of the power station is subject to the regulatory powers of the Factory and Machinery Act 1967, the Federal Court went on say this:

... in other words, the power station for all intent and purpose can be considered as a factory for the production of an article, that is, electricity just like any other manufacturing plants or factories that manufacture goods or articles. The article, that is, electricity is for sale to the consumers, large and small and therefore the respondent to that extent is involved in commercial/business activity peculiar in its own way. (emphasis added)

[43] Earlier, at p. 7, the court also referred to the finding of the High Court that electricity was an article, as follows:

The sole use of the holding by the Applicant is to generate, or in other words, to produce electricity, for sale. Electricity is a form of energy. It has no physical form to make it identifiable as an object or for that matter an article in the normal sense. But energy, or more specifically, electricity in this case, in the context of the business activity of the Applicant, is nevertheless a product. In that sense as a product, electricity is in my view no less an article than say, air. In *Granada TV Network Ltd v. Kerridge (Valuation Officer)*, Knight's Local Government and Magisterial Re.Orts Vol LX1 p 332, 1963, Lord Denning MR said at p 334:

> ... I can well see that water is an article, at any rate when it is confined in a pipe, but I doubt whether water is an article when it is flowing in a river. I can understand that gas is an article when it is confined in a container, but I should doubt whether gas escaping into a room was an article ...

> *The electricity generated by the Applicant on the holding is not released at large as various forms of radiant and electrical energy in nature, but is confined along cables and delivered to consumers, large and small. In that sense it is in my view an 'article' that is made by the Applicant on the holding.* ...
>
> [13] We agree with the learned judge's ruling and for the reasons stated by us, our answer to question (a) is in the affirmative.
>
> (emphasis added)

[44] The Federal Court essentially stated that the power station can be considered as a factory for the production of an article, which article is electricity, just like any other manufacturing plant or factory that manufactures good or articles. The article in question, which is electricity, is for sale to consumers and the respondent, which is effectively the respondent here, is to that extent involved in commercial business or activity peculiar in its own way. The Federal Court thus, found that the respondent's power station was akin to a factory producing electricity similar to any other plant which manufactures goods or articles.

[45] The Federal Court (at pp. 7 and 8) also approved the High Court finding that electricity is a form of energy with no physical form "but energy, or more specifically electricity in the context of the applicant here (effectively our respondent) is nevertheless a product" and "the electricity generated ... is confined along cables and distributed to consumers ... In that sense, it is an article that is made by the applicant on the holding."

[46] We are mindful that *MPSP* was not a tax case. However, it recognised how electricity is to be treated and found that it is produced just like any in any other manufacturing plant or factory that manufactures good or articles. The very same TNB's power station in *MBSP* which is our respondent here was also said to be a factory producing electricity.

[47] Significantly, the Federal Court at pp. 9 to 11 referred to two tax cases. The first case is *Canadian Wirevision Ltd v. The Queen* (1979) 2 FC 164. The issue was whether the appellant was involved in the manufacturing or processing of goods so as to be entitled to tax reduction. The goods in question are television and radio signals. At pp. 168 and 169, the following was stated:

> *... the signals captured by the appellant, in my view, are not goods. True, electricity is often referred to as a commodity and even, sometimes, as "goods". However, the electricity that is commonly purchased and sold and referred to as an article of trade is the electricity that is produced, sold and used for its energetic properties.* By contrast, radio and television signals, while electrical currents, are never referred to as goods ... (emphasis added)

[48] The second case is *AGL Victoria Pty Ltd v. Lockwood* [2003] VSC 453 (Victorian unreported judgments). One issue was whether electricity and electrical power goods can be regarded as a purchase. The court in *AGL* at p. 37 referred to the Federal Court case of *State of Electricity Commission of*

Victoria (SECV) v. Federal Commission of Taxation. There, it was conceded by counsel for the commissioner upon appeal at the full federal court that electricity and electrical power were goods as defined in the sales tax legislation. The court in *AGL* then noted what the *SECV* case said at p. 38 as follows:

> [23] In our view that concession was correct. The qualifier 'tangible' primarily has the effect of excluding choses in action. *Clearly electric power is something subject to the dominion of United. It can be transported from place to place. It can be bought and sold.* Other provisions of the Exemptions Act are consistent with electricity or electrical power being goods: s. 10(1)(d)(vii), Sch 1, Items 18(3)(d)(1) and 56. see also explanatory memorandum para. 6.7.

And later they added:

> [28] In the context of the Exemptions Act, and in particular Item 18, *the tangible 'goods' brought into existence for sale in the present case is electrical energy. Energy is a function of power over time. That is the 'commodit(y) of commerce' which is bought and sold. The commodity is electrical energy, rather than electric current having a particular voltage. On this view, a change in current or voltage does not result in the manufacture or production of a different commodity or different goods.*
>
> [29] Notwithstanding what was said by the learned primary judge, *electrical energy can be bought and sold, as such, in a quantifiable amount or by the piece. A consumer purchases and consumes energy by turning on a switch and subsequently turning it off.*
>
> (emphasis added)

[49] At p. 11 of *MBSP*, the Federal Court stated as follows:

> [24] *Though the facts and the legislations in the two cases cited above may be different but the common issue is that electricity or electrical energy has been held as goods which bear the same meaning as articles and would lend support to the interpretation of 'electricity' as an article in the context used in the LGA.*
>
> (emphasis added)

[50] The above para. 24 makes it clear that the Federal Court construed *Canadian Wirevision* and *AGL* together with *SECV* to lend support to its finding that electricity is goods which bear the same meaning as articles and that the applicant there was involved in manufacturing. We therefore, find and agree with the HCJ in para. 28 of the GOJ that those parts of the judgment of those cases formed the *ratio decidendi* and not an *ipsie dixit* or passing remarks.

[51] Due to our finding as above, we will not dwell too much on the other Commonwealth cases referred to by the HCJ. We will just refer to three other cases which supports the act of electricity being manufactured. We find and agree with the HCJ that the production of electricity in those other countries cannot be different from ours.

[52] In *Nuclear Electric Plc v. Bradley (HM Inspector Of Taxes)* 1 68 TC 670, at p. 697, this was how the act of manufacturing electricity from nuclear energy was looked at:

> The costs involved in the process of manufacturing electricity from nuclear fuel can be conveniently divided into three components. The comprises the costs of mining and processing uranium and its delivery to reactor ("the front-end costs"): the second comprises the cost attributable to the period (normally five years) between the time that the uranium is loaded into reactor until it removed, and the third comprises the cost storing and reprocessing the fuel for reuse and the treatment and disposal radioactive waste ("the back-end costs") ...

[53] The other case is *Quebec Hydro-Electric Commission v. The Deputy Minister Of National Revenue For Customs And Excise* [1970] RCS 30. At p. 34, the court considered the findings of the Tariff Board that:

> The electrical energy produced by the applicant is not a commodity which is ordinarily used by or sold to its customers until it has been transformed; it exists, prior to such transformation, in a form which is not generally marketable because it is unsuited for the use of most customers.
>
> Because it is the transformation in issue that turns the electrical energy into a form that can be used by the customer, this transformation must be considered to be part of the manufacture and production of electricity. Because the transformation of voltage is done exclusively in the transformers and by the transformers, they are apparatus sold to or imported by the applicant for use by it directly in the manufacture or production of goods.

[54] In *Board Of Councillors, Bhatpara Municipality v. CESC Ltd & Ors* (2007) 3 CHN 328, it was held at p. 336:

> 42. Accordingly, we conclude that "generating, transforming and distributing" is nothing but a part of "manufacturing process" of electricity and thereby 'switching-cum-substation' has to be treated as industrial use.

[55] With regard to the decisions of foreign countries, we refer to another decision of the Federal Court in *Director-General Of Inland Revenue v. Kulim Rubber Plantations Ltd* [1980] CLJU 141; [1980] 1 LNS 141; [1981] 1 MLJ 214 at p. 216:

> ... Insofar as the decisions of other courts in these and other countries are concerned, we have always treated these judgments as of only persuasive authority, but we have never lightly treated them or refused to follow them, unless we can successfully distinguish them or hold them as *per incuriam*. Other than for these reasons, we should as a matter of judicial comity and for the orderly development of law, pay due and proper attention to them. ...

[56] To conclude on this issue, we find that the generation, transmission and distribution of electricity amounts to the manufacturing of electricity. The respondent is thus involved in the business of manufacturing electricity.

Eligibility For The RA

[57] The respondent has therefore fulfilled the requirements of para. 1, Schedule 7A read together with para. 8 in relation to a qualifying project, so as to entitle it to its claim for the RA.

Paragraph 7, Schedule 7A

[58] Further, the respondent does not fall within the circumstances listed in para. 7 where it cannot claim for the RA. Those circumstances are in relation to the Promotion of Investments Act 1986 (PIA) on pioneer status, pioneer certificate, investment tax allowance and certain other approvals. It is not disputed that the respondent did not claim for any of such incentives under the PIA.

Income Tax (Prescription Of Activity Excluded From The Definition Of Manufacturing) Rules 2012 (2012 Rules)

[59] Pursuant to the Income Tax (Prescription of Activity Excluded from the Definition of "Manufacturing") Rules 2012 (PU(A)23/2012), there are 20 activities which have been excluded as not being manufacturing. It is also not disputed that the manufacture of electricity is absent in the exclusion.

[60] If it had been intended to exclude the generating of electricity from the activity of manufacturing, it should have been so stated in the 2012 Rules. As was said in *Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd* (2015) MTSC 30-091; at para. 13:

> **If Parliament had intended reinvestment allowance to be restricted only to "production area", then Parliament would have surely specified this clearly in Schedule 7A.** In United Kingdom, the United Kingdom tax authority's attempt to impose an additional condition in determining the taxpayer's eligibility for industrial building allowance was rejected by the House of Lords in *Saxone Liiley & Skinner (Holdings) Ltd v. Commisioner of Inland Revenue* [1967] 44 TC 122. Lord Reid commented that:
>
> > The Crown's main argument was that 'in use for the purposes of a trade' or of a part of a trade means wholly or mainly in use for such purposes. **But that involves writing in words** which are not there, and I can see **nothing in the context to make that necessary.** Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that to he made clear ...
> >
> > (emphasis added)

Whether The Definition Of "Manufacturing" Applies

[61] Paragraph 9, Schedule 7A defines "manufacturing" as follows:

"manufacturing" means -

(a) conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the composition, nature or quality of such materials;

(b) assembly of parts into a piece of machinery or products; or

(c) mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intra molecular bonds or by altering the spatial arrangement of atom in the molecule, but does not include -

(aa) the installation of machinery or equipment for the purpose of construction;

(bb) a simple packaging operations such as bottling, placing in boxes, bags and cases;

(cc) a simple fixing;

(dd) a simple mixing of any products;

(ee) a simple assembly of parts;

(ff) any activity to ensure the preservation of products in good condition during transportation and storage;

(gg) any activity to facilitate shipment and transportation;

(hh) any activity of packaging or presenting goods for sale; or

(ii) any activity that may be prescribed by the Minister, notwithstanding the above interpretation;

[62] It must be noted that the definition of "manufacturing" was inserted into para. 9 *vide* s. 46(f) of the Finance Act 2009 with effect from YA 2009. The respondent had already prior to that first applied for the RA in YA 2003. As provided in para. 2B, Schedule 7A, the RA is a claim that lasts for 15 years from the year it was first claimed. Paragraph 2B provides as follows:

2B. Subject to this Schedule and notwithstanding paragraph 2, where a company has first made a claim for an allowance under this Schedule in the return of its income and the period for fifteen consecutive years of assessment referred to in paragraph 2 -

(a) ended in the year of assessment 2019 or in any other preceding year of assessment, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2020, 2021, 2022, 2023 and 2024;

(b) ends in the year of assessment 2020, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2021,2022, 2023 and 2024;

A (c) ends in the year of assessment 2021, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2022, 2023 and 2024; or

(d) ends in the year of assessment 2022, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the years of assessment 2023 and 2024; or

(e) ends in the year of assessment 2023, an allowance under paragraph 1 or 1A shall be given in respect of capital expenditure incurred by the company in the basis period for the year of assessment 2024.

[63] It follows that the definition of "manufacturing" does not apply to the respondent where its RA claim was made in YA 2003 and the definition was with effect from YA 2009. The respondent's existing right cannot be affected by the new definition. In *Kidurong Power Generation,* it was said *inter alia* that:

[28] However, I view that the Respondent's Decision has failed to consider the Applicant's vested rights *ie*, failed to give effect to the 2017 Tax Incentive Approval which entitles the Applicant to carry forward any utilised allowances for a particular YA to subsequent YAs indefinitely, until the entire amount of the allowances has been claimed.

[29] I find that these vested rights have been preserved by section 30 of the Interpretation Act 1948 & 1967 (Interpretation Act) and have not been taken away by the amendment by virtue of section 29 of the Finance Act.

[64] In *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339, the following was stated at p. 345:

... There is therefore a doubt whether the legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt, the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose. ...

[65] As the definition of "manufacturing" does not apply, an ordinary dictionary meaning can be given to it. The *Oxford Dictionary of English* (2nd edn, revised) ascribes to manufacturing the meaning of "make something on a large-scale using machinery"; "make or produce (something abstract) in a merely mechanical way". The Collins online dictionary has "manufacture" to mean "the making or producing of anything; generation". Within these confines and meaning, the generating of electricity would amount to manufacturing. This is also consistent with *MBSP*, *Canadian Wirevision*, *AGL*, *SECV* and the other cases referred to earlier.

[66] We are not restrained from attributing to "manufacturing" a dictionary meaning. In *Success Electronics*, there was no definition of "factory" at the material time and recourse was had to the meaning found in the dictionary.

Whether The Definition Of "Factory" Applies

[67] It was submitted by the appellant that the respondent is required to carry out the manufacturing activity in a factory, as per the definition of manufacturing read with the definition of factory. As the business activities are not carried out in a factory, the items being claimed are not machinery installed in a factory where there is no factory in the first place.

[68] Paragraph 9, Schedule 7A defines "factory" as follows:

> "factory" means portion of the floor areas of a building or an extension of a building used for the purposes of qualifying project to place or install plant or machinery or to store any raw material, or goods or materials manufactured prior to sale:
>
> Provided that in respect of portion of the building or extension of the building used for the storage of raw material, or goods or materials, or both, it shall not be more than one-tenth of the total floor areas of that building or extension;

[69] It must be noted that the definition of "factory" was inserted into para. 9 *vide* s. 23(c) of the Finance Act 2012. This is also after the respondent first submitted its RA claim for YA 2003. Our finding as above on "manufacturing" would equally apply to "factory".

[70] We only wish to add that in construing the meaning of "factory", the functionality of the claimed items has to be considered. This was as stated in *Success Electronics* as follows:

> 20 ... The functionality of the claimed items in the overall context of the production in the manufacturing process in the factory ought to be taken as a valid factor to be considered in giving the appropriate meaning to the word 'factory' ...

[71] As was said by the HCJ in para. 55 of the GOJ and which we agree with, it is not difficult to comprehend that the claimed items are not adjunct to the process of manufacturing and relate to the manufacturing of electrical energy. This would entail the functionality of the items.

[72] Further para. 1(b), Schedule 7A, states the claim for the RA on capex is on a factory, plant or machinery, whereby these words are to be read disjunctively.

The Respondent Is Not A Service Provider

[73] Since we find that the respondent is involved in the business of manufacturing electricity, it follows that it is not a service provider where Schedule 7B would have applied.

Purposive Approach On The RA And The Meaning Of Manufacturing

[74] Section 17A of the Interpretation Acts 1948 and 1967 states as follows:

> **Regard to be had to the purpose of Act**
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[75] The purposive approach in the interpretation of taxing statutes has been recognised by the Federal Court in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97. At p. 272 (CLJ); p. 105 (MLJ), it was said that:

> [2] ... *It is clear beyond doubt that in view of s. 17A of the Interpretation Acts 1948 and 1967 there is now a statutory recognition for the courts to take purposive approach in the interpretation of statutes including taxing statutes.*
>
> [3] In England, though there is no equivalent provision of our s. 17A there, the House of Lords in dealing with a taxing statute in *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593 (by majority) took a purposive approach. This is what Lord Griffiths said at p. 617:
>
> > The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. *The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry.* The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. *The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*
>
> (emphasis added)

[76] We turn now to the intention of the Legislature in introducing Schedule 7A of the ITA. It may be gleaned from the meaning of "qualifying project" which is a project to expand, modernise or automate an existing business in respect of which the RA can be granted.

[77] At the Parliamentary debate on 13 December 1978, this was said by the then Deputy Minister of Finance at pp. 4210 to 4211:

> Di dalam Ucapan Belanjawan 1979, Yang Berhormat Mulia Menteri Kewangan telah juga mengemukakan cadangan *untuk mengadakan galakan bagi perusahaan-perusahaan yang sudah bertapak dalam bentuk elaun pelaburan semula untuk menggalakkan mereka mengadakan rancangan permodenan serta*

> *menambahkan pengeluaran.* Fasal 18 menyediakan suatu jadual baru 7A dalam Akta Cukai Pendapatan, 1967 bagi elaun pelaburan semula ialah 25% daripada perbelanjaan modal yang dikenakan kepada suatu kilang loji atau alat jentera yang digunakan bagi sesuatu projek yang diluluskan. Perbelanjaan itu mestilah dikenakan dalam tempoh 3 tahun dari 1hb Januari 1979, Pendapatan yang diselaraskan bersamaan dengan jumlah elaun pelaburan semula adalah dikecualikan daripada cukai. Jika ada kerugian, elaun pelaburan semula itu akan dibawa ke hadapan.
>
> (emphasis added)

[78] As alluded to earlier, there really was no dispute that capex had been incurred on the items claimed under the RA where the only issue was on whether the respondent was involved in the business of manufacturing electricity.

[79] We are therefore of the considered opinion that a purposive approach towards the interpretation of Schedule 7A rather than giving a restrictive meaning to "manufacturing" would go a long way towards giving effect to the legislative intent of Parliament.

Whether Schedule 7A Or 7B Is An Option

[80] We agree with the appellant that the incentives provided under Schedule 7A or 7B are not an option. The aforesaid provisions do not provide that it is an option and the HCJ cannot read words into the statute where it is not entitled to do so. This has been made clear by the Federal Court in *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581 at p. 688 (CLJ); p. 590 (MLJ):

> [18] In construing a statute the duty of the Court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The Court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.

[81] However, nothing turns on this finding. What this entails is that the taxpayer can apply for the special incentive relief either under Schedule 7A or Schedule 7B. If the taxpayer meets the conditions stipulated under Schedule 7A, he gets the RA and that ends the matter. It is not by compulsion that the taxpayer must apply under Schedule 7A or Schedule 7B. It is a matter of compliance of the relevant provisions under which the taxpayer applies.

Kidurong Power Generation

[82] With regard to *Kidurong Power Generation*, we find that this was a case of the company challenging the Minister's decision to restrict the taxpayer's tax incentive approval. The business there did not entail distribution of electricity. The respondent too is not a privy to that case.

A

Conclusion

[83] For the above reasons, we find no merit in the appeal. The respondent has fulfilled the requirements to claim the RA pursuant to Schedule 7A of the ITA. In particular, we find that the respondent is involved in the business of manufacturing electricity and is not a service provider. The appeal is dismissed. As the respondent is not seeking costs, we exercise our discretion not to award costs.

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